

MOHD SALLEH SHEIKH AHMAD

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v.

YEWPA M SDN BHD

COURT OF APPEAL, PUTRAJAYA

b

GOPAL SRI RAM JCA

ABDUL AZIZ MOHAMAD JCA

MOHD GHAZALI YUSOFF JCA

[CIVIL APPEAL NO: Q-02-918-2001]

14 OCTOBER 2005

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EQUITY: *Equitable remedies and reliefs - Principles applicable - Whether award of damages in lieu of specific performance justified - Whether court entitled to grant alternative relief or to impose conditions or to require an equitable adjustment to be made between parties*

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CIVIL PROCEDURE: *Pleadings - Counterclaim - Orders made on a counterclaim that was found to have no merit - Whether erroneous - Whether only path open was for court to dismiss counterclaim - Whether plaintiff entitled to rely on defendant's counterclaim to support orders made - Whether plaintiff could add a counterclaim to defendant's counterclaim*

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The parties in this case entered into two separate agreements dated 14 November 1996 and 19 October 1998. The plaintiff sued for specific performance of the first agreement and in the alternative claimed liquidated damages of RM2,610,000, and it also claimed interest on its claim for liquidated damages; no other form of relief was claimed by the plaintiff. The defendant pleaded several defences and also raised a counterclaim in which he claimed several forms of relief. Despite all the defences and the case pleaded in the counterclaim failing, the trial judge proceeded to make several orders on the claim and the counterclaim *ie*, Orders (1) - (12). Order (1) was for judgment to be entered for the plaintiff against the defendant for the sum of RM870,000 together with statutory interests and costs, while Order (2) stated that the plaintiff should cause to be re-transferred to the defendant the 30% share in the firm of one Syarikat State Motor. The main issue, however, was whether the learned judge was correct in making Orders (3) - (12) *ie*, whether he could, after having decided against the defendant on the counterclaim, proceed to make orders on it.

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a Held (allowing the appeal in part)
Per Gopal Sri Ram JCA:

b [1] It is trite that once a counterclaim is found to be without merit, the only path open to a court is to dismiss it. A court is not entitled to resurrect a dead counterclaim to found a basis for granting relief which the court considers should be granted on the facts. If that is done, there is a serious risk of it being taken as an attempt at palm tree justice. Further, a prayer for relief in a counterclaim cannot be used against the defendant himself. The plaintiff made a feeble attempt at justifying the orders that were the subject matter of complaint in this appeal by saying that he was entitled to rely on the defendant's counterclaim to support those orders. This argument was futile; if the plaintiff wanted the kind of orders the judge made, it should have amended its statement of claim to include them. It could not rely on the defendant's counterclaim to obtain relief against the defendant himself. Also, the plaintiff could not, when delivering its reply and defence to the counterclaim, have added a counterclaim to the defendant's counterclaim since it was already a party to the action. That avenue is only open to a defendant to the counterclaim who is not already a party in the main action. (p 825 b-e)

e [2] So far as the first order was concerned, the judge was amply justified in making the award of damages *in lieu* of specific performance, having satisfied himself that the claim had been made out on the evidence. Next, the second order, although not claimed by the plaintiff was a necessary adjunct and hence a consequential order. No complaint may be made about it as the High Court was being moved for equitable relief in the form of specific enforcement. When considering the grant of specific relief, the High Court, as a court of equity, is entitled to grant alternative relief or to impose conditions, or to require an equitable adjustment to be made between the parties. The second order made by the learned judge was plainly supportable on this basis. (pp 825 f-g & 826 b)

g [3] For the reasons already given, the appeal was allowed in part. Orders (1) and (2) were affirmed whereas orders (3) through (12) were set aside. (p 826 c)

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Per Abdul Aziz Mohamad JCA (concurring, except in respect of Order (2)): *a*

[1] As the appellant did not appeal against the second order (although this court affirmed it) and as moreover it was an order that the appellant himself sought in his counterclaim, the question of justifying or finding support for the second order did not arise and could not have arisen in the appeal. (p 826 g) *b*

[Bahasa Malaysia Translation Of Headnotes

Pihak-pihak dalam kes ini telah memeterai dua perjanjian yang berasingan masing-masing pada 14 November 1996 dan 19 Oktober 1998. Plaintiff menuntut pelaksanaan spesifik bagi perjanjian pertama dan secara alternatifnya menuntut ganti rugi jumlah tertentu sebanyak RM2,610,000 beserta dengan faedah; selain dari itu, tiada relif lain dipohon oleh plaintiff. Defendan memplid beberapa pembelaan dan membangkitkan tuntutan balas di mana ia memohon beberapa relif. Walaupun pembelaan-pembelaan serta kes yang diplidkan di dalam tuntutan balas menemui kegagalan, yang arif hakim telah membuat beberapa perintah berkaitan tuntutan dan tuntutan balas, iaitu Perintah-Perintah (1) - (12). Perintah (1) adalah supaya penghakiman dimasukkan untuk plaintiff terhadap defendan bagi jumlah RM870,000 bersama dengan faedah statutori dan kos, sementara Perintah (2) menyatakan bahawa plaintiff harus memindahkan 30% saham firma Syarikat State Motor kepada defendan. Isu utama, bagaimanapun, adalah sama ada yang arif hakim betul dalam membuat Perintah (3) - (12), iaitu, sama ada beliau boleh, setelah menolak tuntutan balas defendan, membuat perintah-perintah berkenaan. *c*
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Diputuskan (membenarkan rayuan sebahagiannya) *f*
Oleh Gopal Sri Ram HMR:

[1] Sudah menjadi kebiasaan bahawa sebaik sahaja tuntutan balas didapati tidak bermerit, maka satu-satunya jalan yang terbuka kepada mahkamah adalah untuk menolaknya. Mahkamah tidak boleh menghidupkan kembali suatu tuntutan balas yang sudah mati bagi mengasaskan pemberian relif yang difikirkan patut diberi oleh mahkamah berdasarkan fakta. Jika itu dilakukan, ia membangkitkan risiko serius bahawa ia akan dipandang sebagai satu percubaan untuk mengkompromi keadilan. Selain itu, permohonan untuk relif di bawah tuntutan balas tidak boleh digunakan terhadap defendan sendiri. Plaintiff membuat percubaan lemah untuk menjustifikasikan perintah-perintah yang menjadi halperkara bantahan dalam rayuan di sini dengan mengatakan bahawa beliau berhak untuk bergantung atas tuntutan balas defendan untuk menyokong perintah-perintah tersebut. Ini suatu hujah yang sia-sia; jika *g*
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- a* plaintiff inginkan perintah-perintah yang dibuat oleh hakim, ia harus meminda pernyataan tuntutan untuk memasukkan relif-relif tersebut. Plaintiff tidak boleh bergantung kepada tuntutan balas defendan bagi mendapatkan relif terhadap defendan. Selanjutnya, sewaktu memasukkan jawapan dan pembelaan kepada tuntutan balas, plaintiff tidak boleh menambah suatu tuntutan balas terhadap tuntutan balas defendan kerana ia sudah pun menjadi pihak kepada tindakan. Tindakan sedemikian hanya terbuka kepada seorang defendan kepada tuntutan balas yang belum menjadi pihak kepada tindakan induk.

- c* [2] Berkaitan perintah pertama, hakim mempunyai alasan kukuh untuk memberi award ganti rugi sebagai ganti pelaksanaan spesifik, setelah berpuas hati bahawa tuntutan telah dibuktikan secukupnya. Kemudian, berhubung perintah kedua, walaupun tidak dituntut oleh plaintiff, ia tetap merupakan suatu yang perlu untuk dijadikan perintah sampingan. Tiada rungutan boleh dibuat terhadapnya kerana Mahkamah Tinggi telah digerak untuk memberi relif berekuiti dalam bentuk pelaksanaan spesifik. Apabila menimbang pemberian relif spesifik, Mahkamah Tinggi, sebagai mahkamah ekuiti, berhak untuk memberi relif alternatif atau untuk mengenakan syarat-syarat, atau meminta pihak-pihak untuk membuat penyesuaian di antara mereka. Perintah kedua yang dibuat oleh yang arif hakim jelas dapat disokong atas alasan ini.

- e* [3] Berdasarkan alasan-alasan yang diberi, rayuan dibenarkan sebahagiannya. Perintah (1) dan (2) dibenarkan, sementara Perintah-Perintah (3) hingga (12) diketepikan.

- f* **Oleh Abdul Aziz Mohamad HMR (menyetujui, kecuali bagi Perintah (2)):**

- g* [1] Oleh kerana perayu tidak merayu terhadap perintah kedua (walaupun mahkamah ini mengesahkannya) dan selanjutnya oleh kerana ia merupakan suatu perintah yang dipohon sendiri oleh perayu di dalam tuntutan balasnya, maka soal menjustifikasikan atau mencari sokongan bagi perintah kedua tersebut tidak berbangkit dan tidak boleh berbangkit di dalam rayuan ini.

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Case(s) referred to:

Dusik v. Newton [1985] 62 BCLR 1 (*refd*)
Pettikus v. Becker [1980] 117 DLR (3d) 257 (*refd*)
Solle v. Butcher [1949] 2 All ER 1107 (*refd*)

*For the appellant - Wong Chong Wah (Shankar P Asnani & Elanie Ho with him);
M/s Shankar Ram & Co*

For the respondents - James Lo Kuin Chuan; M/s George Lo & Partners

[Appeal from High Court, Kuching; Civil Suit No: 22-13-2000-I]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

The parties in this case entered into 2 separate agreements. The first agreement is dated 14 November 1996. The second is dated 19 October 1998. The plaintiffs sued for specific performance of the first agreement and in the alternative claimed liquidated damages of RM2,610,000. It also claimed interest on its claim for liquidated damages. It is important to stress here that no other form of relief was claimed by the plaintiff.

The defendant pleaded several defences. He also raised a counterclaim in which he claimed several forms of relief. All defences failed as did the case pleaded in the counterclaim. Despite this, the trial judge proceeded to make several orders on the claim and the counterclaim. We quote them from his judgment:

In the premises:

- (1) Judgment is entered for the plaintiff against the defendant for the sum of RM870,000 together with statutory interest and costs;
- (2) The plaintiff shall cause to be re-transferred to the defendant the 30% share in the firm of Syarikat State Motor;
- (3) An account shall be taken of the rentals of the shops and the house which the plaintiff or Ho Kok Thin or their nominee had received or the relevant market value of the rent receivable at the relevant time for these properties where the properties had been used by the plaintiff or Ho Kok Thin or their nominee;
- (4) These sums when found shall be regarded as an amount due from the plaintiff to the defendant and the defendant shall be given credit and the balance of RM2,339,961.42 owing by the defendant to the plaintiff shall be reduced accordingly and the reduced sum so found shall be regarded as a debt due from the defendant to the plaintiff;

- a* (5) The shops shall be sold by public auction within 90 days hereof at the reserved price of RM1,025,800 and it is to be free from encumbrances.
- (6) The house shall be sold by public auction within 90 days hereof at the reserved price of RM254,800.
- b* (7) The plaintiff shall cause the auctions to be conducted by a court bailiff by taking out a summons for directions for that purpose and the plaintiff shall bear the initial costs of the auctions.
- (8) The plaintiff or Ho Kok Thin or their nominee shall be liable to discharge all the charges created against the properties to enable a transfer of the properties free from encumbrances in the event that a party other than the plaintiff or Ho Kok Thin or their nominee successfully bided for the properties or any of them provided that the proceeds of the sale shall first go towards satisfying the charge or charges with the plaintiff or Ho Kok Thin or their nominee making up the deficient amount, if any.
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- d* (9) The plaintiff or Ho Kok Thin or their nominee shall be entitled to bid for the properties and they shall be entitled, in the event that they are successful, to off-set the amount owing by the defendant to the plaintiff aforesaid as payment of the bid price.
- (10) In the event of the plaintiff or Ho Kok Tin or their nominee successfully bidding for the property, the bailiff's fee shall be paid by the plaintiff on behalf of the defendant and such fee shall become a debt due from the defendant to the plaintiff in the account to be taken.
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- (11) In the event of a successful bid by someone else, the proceeds of the sale shall be deposited with the court to be dealt with as aforesaid and the balance, if any, shall await an order of the court.
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- (12) The parties are at liberty to agree on the sale of the properties by private treaty at such sums and on such conditions as they may agree notwithstanding the orders I have just made.

g There will be no order as to costs for the counterclaim as on the whole the defendant can be said to have failed though an account has been ordered to be taken but this is miniscule compared to the other counterclaims which had failed.

h Several issues were raised before us. Because of the approach we took in this appeal at the close of arguments, I find it unnecessary to deal with any of them save one. And that has to do with whether the judge was correct in making orders 3 through 12 quoted above. A careful reading of his judgment leaves no doubt that he was completely dissatisfied with the defendant's evidence. He was entirely justified in that. Even basing myself on the printed notes of evidence I find myself entirely in agreement with the judge that the

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defendant wholly lacked credibility. That is why the judge found the defences to be hollow and the counterclaim to lack any evidential foundation. The difficulty in this case is that having decided against the defendant on the counterclaim, he proceeded to make orders on it.

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It is trite that once a counterclaim is found to be without merit the only path open to a court is to dismiss it. A court is not entitled to resurrect a dead counterclaim to found a basis for granting relief which the court considers should be granted on the facts. If that is done there is a serious risk of it being taken as an attempt at palm tree justice. Further, a prayer for relief in a counterclaim cannot be used against the defendant himself. These are indeed the complaints of Mr Wong Chong Wah of counsel for the defendant (the appellant before us). I find these complaints justified.

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Learned counsel for the plaintiff (respondent before us) made a feeble attempt at justifying the orders that are the subject matter of complaint in this appeal. He said that he was entitled to rely on the defendant's counterclaim to support these orders. I have already demonstrated the futility of this argument. If the plaintiff wanted the kind of orders the judge made, it should have amended its statement of claim to include them. It could not rely on the defendant's counterclaim to obtain relief against the defendant himself. Also, the plaintiff could not, when delivering its reply and defence to counterclaim, have added a counterclaim to the defendant's counterclaim since it was already a party to the action. That avenue is open only to a defendant to the counterclaim who is not already a party in the main action.

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So far as the first order is concerned, the judge was amply justified in making the award of damages in lieu of specific performance having satisfied himself that the claim had been made out on the evidence. Next, the second order, though not claimed by the plaintiff is a necessary adjunct and hence a consequential order. No complaint may be made about it. In fact there is no complaint about it. That is hardly surprising. After all, the High Court here was being moved for equitable relief in the form of specific enforcement. When considering the grant of specific relief the High Court, as a Court of Equity, is entitled to grant alternative relief or to impose conditions (as was done in *Solle v. Butcher* [1949] 2 All ER 1107) or to require an equitable adjustment to be made between the parties.

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Dusik v. Newton [1985] 62 BCLR 1, a decision of the Court of Appeal of British Columbia is an instructive case on the flexibility of equitable remedies. That case is authority for the proposition that where rescission is impossible or inappropriate, and it would be inequitable for a defendant to retain the benefits of an unconscionable bargain, a Court of Equity could mould a remedy,

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- a* such as equitable adjustment, to achieve justice. The court in that case relied on the following passage in the judgment of Dickson J (as he then was) in *Pettkus v. Becker* [1980] 117 DLR (3d) 257 where he said (at p 273):

- b* The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice.

The second order made by the learned judge is plainly supportable on this basis.

- c* For the reasons already given, the appeal was allowed in part. Orders (1) and (2) were affirmed. The orders (3) through (12) were set aside. The appellant was given its costs of the appeal. The order for costs in the court below both on the claim and the counterclaim were affirmed. The deposit paid into court was ordered to be refunded to the appellant. We were advised that there was a sum paid into court by the defendant pursuant to an order of this court. That sum was ordered to be paid out forthwith to the first respondent.

- d* **Abdul Aziz Mohamad JCA:**

- e* I have read the draft of my learned brother Gopal Sri Ram JCA's grounds of judgment. I associate myself with the contents of the draft except in the matter of the second order, which was about the 30% share in Syarikat State Motor. That order was one of the reliefs sought by the appellant in his counterclaim, as may be seen in para. 19(6) of the statement of defence and counterclaim. The learned judge granted the appellant that relief, as may be seen in para. 60 of the judgment. Since the second order had been sought by the appellant himself, naturally it was not included in his notice of appeal as a decision appealed against. My learned brother, however, in para. 6 of his
- f* draft, appears to view the second order as a relief for the respondent company which, though not claimed by them specifically, was "a necessary adjunct and hence a consequential order" to the first order, which was a RM870,000 judgment for the respondent company. And paras 6 and 7 set out considerations of principles of equity that my learned brother considers would support or justify
- g* the granting of the second order. As, however, the appellant did not appeal against the second order (although affirm it we did), and as moreover it was an order that the appellant himself sought in his counterclaim, the question of justifying or finding support for the second order did not arise and could not have arisen in the appeal, and therefore, in my respectful view, the discussion
- h* in paras. 6 and 7 of my learned brother's draft is superfluous.

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